

07-14816-B

United States Court of Appeals
for the Eleventh Circuit

Victor DiMaio,

Plaintiff-Appellant,

v.

Democratic National Committee
and Florida Democratic Party

Defendants-Appellees

Appeal from the United District Court
Middle District of Florida

Answer Brief of
Democratic National Committee

Counsel for Democratic National Committee:

Charles F. Ketchey, Jr.
Akerman Senterfitt, P.A.
401 East Jackson Street
Tampa, Florida 33602
813-209-5060

Joseph E. Sandler
Sandler, Reiff & Young, P.C.
50 E Street, S.E., #300
Washington, D.C., 20003
202-479-5153

Amanda S. LaForge
430 S. Capitol Street, S.E.
Washington, D.C. 20003
202-572-7851

Case No. 07-14816-B

Victor DiMaio v. Democratic National Party

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT
PURSUANT TO FRAP 26.1 AND 11TH CIR. R. 26.1-1**

Pursuant to FRAP 26.1 and 11th Cir. Rule 26.1-1, appellee Democratic National Committee (“DNC”) hereby certifies that the following persons, have an interest in the outcome of this appeal, listed in alphabetical order with descriptions:

1. Akerman Senterfitt, P.A. – Counsel to Democratic National Committee ("DNC").
2. Democratic National Committee – a District of Columbia nonprofit, unincorporated association. ("DNC")
3. Victor DiMaio
4. DNC Services Corporation – a District of Columbia nonprofit corporation which holds assets of the Democratic National Committee. DNC and DNC Services Corporation are registered together as the national committee of the Democratic Party of the United States under and for purposes of the Federal Election Campaign Act of 1971 as amended, 2 U.S.C. §431(14). Neither the DNC nor DNC Services has issued any

Victor DiMaio v. Democratic National Party

shares and neither has any parent, subsidiary or affiliate that has issued any shares.

5. Florida Democratic Party.
6. Mark Herron, Counsel to Florida Democratic Party
7. Charles F. Ketchey, Jr., Counsel to DNC.
8. Amanda S. LaForge, Chief Counsel, DNC.
9. The Honorable Richard A. Lazarra, United States District Judge, Middle District of Florida.
10. Messer, Caparello & Self, P.A Counsel to Florida Democratic Party
11. Joseph E. Sandler, Counsel to DNC
12. Sandler, Reiff & Young, P.C., Counsel to DNC
13. Sean M. Shaw, Counsel to Florida Democratic Party
14. Michael Steinberg, Counsel to Victor DiMaio
15. Robert J. Telfer, III, Counsel to Florida Democratic Party

**STATEMENT REGARDING ORAL ARGUMENT
PURSUANT TO 11TH CIR. R. 28-1(C)**

Pursuant to FRAP 34(a) and 11th Cir. R. 28-1(c), appellee Democratic National Committee states that it desires oral argument. Oral argument should be heard because such argument would significantly aid in the Court's decisional process.

TABLE OF CONTENTS

<u>Heading</u>	<u>Page</u>
CERTIFICATE OF INTERESTED PERSONS AND CORPORATE	
DISCLOSURE STATEMENT	C-1
STATEMENT REGARDING ORAL ARGUMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF JURISDICTION	vii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
(a) Course of Proceedings and Dispositions in the Court	
Below	2
(b) Statement of Facts.....	3
(c) Standard of Review.....	5
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. The Allegations of the Complaint Could Not Establish	
that the DNC Is Acting Under Color of State Law	7

A.	The DNC Has the Right to Refuse to Recognize the State-Run Primary as Binding and To Require FDP to Run an Alternative Process	8
B.	None of the Tests for State Action Is Met	11
C.	Since the Supreme Court Has Recognized That the National Parties’ Right to Establish and Enforce Delegate Selection Rules Is Constitutionally Protected, No Court Has Held That Enforcement of those Rules Constitutes State Action	14
II.	Even If the DNC Were a State Actor, Its Enforcement of Its Delegate Selection Rules Is Protected by the First Amendment	19
III.	The District Court Correctly Found that Mr. DiMaio Lacks Standing	24
	CONCLUSION	27
	CERTIFICATE OF SERVICE	29

TABLE OF AUTHORITIES

Cases

<i>Bachur v. Democratic National Party</i> , 836 F.2d 837 (4 th Cir. 1987)	21
<i>Bode v. Democratic National Party</i> , 452 F.2d 1302 (D.C. Cir. 1971)	16, 17
<i>Cousins v. Wigoda</i> , 419 U.S. 477, 95 S. Ct. 541 (1975)	9, 12, 14, 16
<i>Democratic Party of the United States v. Wisconsin ex rel. LaFollette</i> , 450 U.S. 107, 101 S. Ct. 1010 (1981)	9, 10, 11, 12, 24
<i>Emory v. Peeler</i> , 756 F.2d 1547 (11 th Cir. 1985)	25
<i>Focus on the Family v. Pinellas Suncoast Transit Auth.</i> , 344 F.3d 1263 (11 th Cir. 2003)	11
<i>Fountain v. Metropolitan Atlanta Rapid Transit Auth.</i> , 678 F.2d 1038 (11 th Cir. 1982)	8
<i>Georgia v. National Democratic Party</i> , 447 F.2d 1271 (D.C. Cir.), <i>cert denied</i> , 404 U.S. 858, 92 S. Ct. 109 (1971)	16, 17
<i>Hagans v. Lavine</i> , 415 U.S. 528, 94 S. Ct. 1372 (1974)	8
<i>Harper v. Blockbuster Entertainment Corp.</i> , 139 F.3d 1385 (11 th Cir. 1998)	5
<i>Kirwin v. Price Communications Corp.</i> , 391 F.3d 1323 (11 th Cir. 2004)	5
<i>LaRouche v. Fowler</i> , 152 F.3d 974 (D.C. Cir. 1998)	14, 22
<i>LaRouche v. Fowler</i> , 77 F. Supp. 2d 80 (D.D.C. 1999) (three judge court), <i>aff'd w/o opinion</i> , 529 U.S. 1035, 120 S. Ct. 1529 (2000)	16
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555, 112 S. Ct. 2130 (1992)	25, 26

<i>Morse v. Republican Party of Virginia</i> , 517 U.S. 186, 116 S. Ct. 1186 (1996)	15
<i>National Parks Ass’n. v. Norton</i> , 324 F.3d 1229 (11 th Cir. 2003)	25
<i>O’Brien v. Brown</i> , 409 U.S. 1, 92 S. Ct. 2718 (1972).....	18
<i>Ripon Society Inc. v. National Republican Party</i> , 525 F.2d 567 (D.C. Cir. 1975)(en banc), <i>cert. denied</i> , 424 U.S. 933, 96 S. Ct. 1147 (1976).....	16, 17, 23, 24
<i>Securities and Exchange Commission v. Mutual Benefits Corp.</i> , 408 F.3d 737 (11 th Cir. 2005).....	5
<i>Smith v. Allwright</i> , 321 U.S. 649, 63 S. Ct. 757 (1944)	17
<i>Spain v. Brown & Williamson Tobacco Corp.</i> , 363 F.3d 1183 (11 th Cir. 2004)	5
<i>Terry v. Adams</i> , 345 U.S. 461, 73 S. Ct. 809 (1953)	17
<i>United Public Workers of America v. Mitchell</i> , 330 U.S. 75, 67 S. Ct. 556 (1947).....	27
<i>Vermont Agency of Natural Resources v. United States ex rel. Stevens</i> , 529 U.S. 756, 120 S. Ct. 1858 (2000).....	25
<i>White’s Place, Inc. v. Glover</i> , 222 F.3d 1327 (11 th Cir. 2000).....	26, 27
<i>Williams v. Democratic Party of Georgia</i> , 409 U.S. 809, 93 S. Ct. 67 (1972).....	15
<i>Willis v. Univ. Health Serv., Inc.</i> , 993 F.2d 837 (11 th Cir.), <i>cert. denied</i> , 510 U.S. 976, 114 S. Ct. 768 (1993)	11
<i>Wymbs v. Republican State Exec. Comm. of Florida</i> , 719 F.2d 1072 (11 th Cir. 1983), <i>cert. denied</i> , 465 U.S. 1003, 104 S. Ct. 1600 (1984).....	14, 17, 20, 27

Statutes

28 U.S.C. § 1291.....	vii
-----------------------	-----

28 U.S.C. § 1343.....	8
28 U.S.C. § 1343(3).....	8
28 U.S.C. § 2201.....	25
Section 103.101 Florida Statutes.....	3

Rules

Delegate Selection Rule 11(A).....	3, 4
Delegate Selection Rule 20(C)(1)	4
Delegate Selection Rule 20(C)(1)(a)	4
Delegate Selection Rule 20(C)(5)	4
Delegate Selection Rule 20(C)(6)	4
Eleventh Circuit Rule 26.1-1.....	1
Eleventh Circuit Rule 28-1(c)	i
Federal Rule of Civil Procedure 12(b)(1).....	5
Federal Rule of Civil Procedure 12(b)(6).....	5
Federal Rule of Civil Procedure 26.1	1
Federal Rule of Civil Procedure 34(a).....	i

Constitutional Provisions

14 th Amendment, United States Constitution.....	7, 8, 26
Article II, United States Constitution	7, 26

STATEMENT OF JURISDICTION

The district court dismissed Mr. DiMaio's complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Mr. DiMaio appeals from the district court's October 5, 2007 judgment dismissing his complaint with prejudice. Mr. DiMaio noted a timely appeal. Jurisdiction is proper in this Court under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Could the Democratic National Committee be acting under “color of state law” in enforcing its Delegate Selection Rules by refusing to allow the Florida Democratic Party to use the results of a state-run presidential preference primary to allocate delegates to the Democratic National Convention where that primary violated the Party’s Rules?

2. Even if the DNC were acting “under color of state law,” does an individual voter have the right to compel the DNC to seat delegates in violation of the DNC Delegate Selection Rules given the DNC’s constitutionally-protected freedom of association, embracing its right to establish and enforce such rules?

3. Did the district court properly dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim where Mr. DiMaio, the plaintiff, alleged only hypothetical and speculative constitutional injuries?

STATEMENT OF THE CASE

This was an action for declaratory judgment brought by plaintiff/appellant Mr. DiMaio, asserting that enforcement by appellee Democratic National Committee (the “DNC”) of its rules for selection of delegates to the 2008 Democratic National Convention “may or may not violate the Plaintiff’s right to vote in a Presidential primary election” (Complaint ¶13), and asking the district court to decide that question.

(a) Course of Proceedings and Dispositions in the Court Below

Mr. DiMaio filed his complaint against the DNC and the Florida Democratic Party (“FDP”) on August 3, 2007. (Record Excerpts (“R.E.” Tab B).¹ On September 25, 2007, defendants DNC and Florida Democratic Party (“FDP”) filed motions to dismiss for lack of subject matter jurisdiction. (R.E. Tab C). On October 5, 2007, the district court issued an order granting the motions to dismiss and dismissing the action with prejudice. (Order Granting Defendant’s Motions to Dismiss, Oct. 5, 2007 (“District Court Order”), R.E. Tab D).

¹ Pursuant to FRAP 28(e), since the original record is being used pursuant to Circuit Rules and the excerpts of record have not been consecutively paginated, references to the record are to specific documents in Record Excerpts filed by appellant.

(b) Statement of Facts

The Complaint alleges that Mr. DiMaio is a citizen of Hillsboro County, Florida and a registered Democrat. Complaint ¶ 5. The DNC is the governing body of the Democratic Party of the United States and is responsible for promulgating delegate selection rules for the 2008 Democratic National Convention. Complaint ¶ 3; DNC 2008 Delegate Selection Rules (“Delegate Selection Rules”) attached to Complaint at R.E. Tab B. The FDP is responsible for conducting the process of selecting delegates from Florida to attend the Convention in accordance with the DNC’s delegate selection rules. Complaint ¶ 4.

The DNC’s Delegate Selection Rules provide that no binding presidential preference primary can be held prior to the first Tuesday in February 2008, *i.e.* February 5, 2008, with the exception of four states: Iowa, New Hampshire, Nevada, and South Carolina. Delegate Selection Rule 11(A). In 2007, the State of Florida passed a law, codified at section 103.101 Florida Statutes, providing for a state-run presidential preference primary to be held on the last Tuesday in January, *i.e.* January 29, 2008. Complaint ¶ 8. Were the FDP to treat the state-run primary as binding—that is, use it to allocate delegate positions among presidential candidates—the FDP would

be in violation of the DNC's rules. Delegate Selection Rules 11(A) and 20(C)(1).

The DNC's Delegate Selection Rules also provide that if any state party treats as binding a primary or caucus that violates the DNC rules on timing, that state party automatically loses 50% of its delegates to the Convention; and no member of the DNC and no Member of Congress from that state may attend the Convention as a delegate. Delegate Selection Rules 20(C)(1)(a); Complaint ¶¶7. In addition, the Delegate Selection Rules authorize the DNC's Rules and Bylaws Committee to impose further sanctions, including further reduction of the state's delegation. Delegate Selection Rules 20(C)(5) and (6).

On August 25, 2007, the DNC's Rules and Bylaws Committee voted to reduce Florida's delegation by 100%, unless the state party develops and submits an alternative, party-run process for allocation and selection of delegates, and that process begins (*i.e.*, a party-run primary or caucus takes place) on or after February 5, 2008 as required by the Delegate Selection Rules. Complaint ¶¶ 9, 13. Mr. DiMaio filed his complaint on August 30, 2007.

(c) **Standard of Review**

This Court reviews *de novo* the district court's order dismissing a complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. *Securities and Exchange Commission v. Mutual Benefits Corp.*, 408 F.3d 737, 741 (11th Cir. 2005); *Kirwin v. Price Communications Corp.*, 391 F.3d 1323, 1325 (11th Cir. 2004). In conducting its review, the Court accepts as true the factual allegations in Mr. DiMaio's complaint and construes those facts in the light most favorable to him. *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1186 (11th Cir. 2004). A motion to dismiss may be granted only when a defendant demonstrates "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998) (internal quotation and citation omitted).

SUMMARY OF ARGUMENT

First, the complaint was properly dismissed for failure to state a claim upon which relief can be granted because the allegations of the complaint, even if accepted as true, would not establish that the DNC, in enforcing its delegate selection rules, is acting under color of state law. None of the three tests established by this Court for finding state action have been met. In insisting that the Florida Democratic Party not use a state-run primary that violates the DNC's rules, the DNC is not performing a public function, there is no state compulsion involved and the state plays no role in the establishment or enforcement of the Rules at issue. Since the Supreme Court established that the national parties' rights to enforce their delegate selection rules are protected by the First Amendment as a form of freedom of association, no court has held that a national party's enforcement of such rules constitutes state action. The DNC's promulgation and enforcement of delegate selection rules does not constitute state action.

Second, even if the DNC's enforcement of its Delegate Selection Rules constitutes state action, such enforcement would not violate the Equal Protection Clause because the DNC has its own constitutionally-protected right to determine how delegates should be selected to attend its National Convention, including the determination of which states be allowed to hold

primaries or caucuses before other states. An individual voter has no more right than the state itself to compel the DNC to seat delegates in violation of its own rules.

Third, Mr. DiMaio’s hypothetical allegations of constitutional injury do not establish an actual case or controversy as required under Article III of the Constitution and, for that reason, he lacks standing to bring his claims before the district court.

ARGUMENT

I. The Allegations of the Complaint Could Not Establish that the DNC Is Acting Under Color of State Law

The district court correctly found that the complaint failed to state a claim upon which relief can be granted because the allegations of the complaint would not establish that the DNC, in enforcing its Delegate Selection Rules, is acting under color of state law. Mr. DiMaio alleged, first, that by enforcing its delegate selection rules, the DNC “may be violating his rights under Article II and the 14th Amendment of the United States Constitution.” Complaint ¶ 10. Mr. DiMaio’s Article II claim must fail, however, because as the district court correctly noted, “no provision of Article II confers an actionable right on any individual voter. Instead, Article II directs state legislatures to determine the manner in which electors for the offices of President and Vice-President shall be appointed and

provides the manner in which those electors shall perform their duties.”
District Court Order at 8.

With respect to his claim that by enforcing its delegate selection rules the DNC “may” be violating his rights under the 14th Amendment, Mr. DiMaio relies on 28 U.S.C. § 1343 to confer jurisdiction on the court. Complaint ¶ 1. Section 1343(3) is the “jurisdictional counterpart” to claims brought under the federal civil rights laws and gives federal courts jurisdiction over “claims alleging *official state deprivation* of constitutional rights.” *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1042 n.7 (11th Cir. 1982) (emphasis added). An action by the defendant “under color of state law” is a prerequisite for invoking subject-matter jurisdiction under section 1343(3). *Hagans v. Lavine*, 415 U.S. 528, 538, 94 S. Ct. 1372, 1380 (1974). Here, Mr. DiMaio’s complaint could not establish that the DNC is acting under color of state law in enforcing its Delegate Selection Rules.

A. The DNC Has the Right to Refuse to Recognize the State-Run Primary as Binding and To Require FDP to Run an Alternative Process

In the establishment and enforcement of rules for selecting delegates to its national convention, the “national Democratic Party and its adherents enjoy a constitutionally protected right of political association.” *Cousins v.*

Wigoda, 419 U.S. 477, 487, 95 S. Ct. 541, 547 (1975). In *Cousins*, the DNC refused to seat Illinois’ delegates to the 1972 Democratic National Convention, because those delegates, although elected in a state-run primary in accordance with state law, had been selected in violation of the national party’s delegate selection rules. A state court ordered the delegates seated in accordance with state law; the state appellate courts upheld that order. The U.S. Supreme Court reversed, holding that the DNC had a constitutionally-protected right to enforce its delegate selection rules, while the “States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates.” 419 U.S. at 489-90, 95 S. Ct. at 549. “Thus, Illinois’ interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention.” *Id.* at 491, 95 S. Ct. at 549.

Then, in *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 101 S. Ct. 1010 (1981), Wisconsin state law provided for a presidential primary open to Republicans and independents, and required delegates to vote in accordance with the results of the primary. The state submitted a delegate selection plan providing for such an open primary. The DNC’s Compliance Review Commission (now the DNC Rules and

Bylaws Committee) disapproved the plan because the plan violated the DNC delegate selection rule banning open primaries. The DNC indicated that delegates chosen under the plan would not be seated at the 1980 Convention. The State of Wisconsin sued in the state Supreme Court to force the DNC to seat the delegates. The state court ordered that the delegates be seated based on the results of the state-run open primary. The U.S. Supreme Court reversed, ruling that the State of Wisconsin could not force the DNC to seat a delegation chosen in contravention of the DNC's rules because such a requirement would violate the party's associational rights protected by the First Amendment. 450 U.S. at 122, 101 S. Ct. at 1019.

The Court rejected Wisconsin's argument that its open primary law placed only a minor burden on the national party, holding that a "State . . . may not substitute its own judgment for that of the Party. *A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution.*" 450 U.S. at 123-24, 101 S. Ct. at 1020 (emphasis added). The Court concluded that Wisconsin was certainly free to conduct a primary that violated the DNC rules, but that if Wisconsin did so, "it cannot require that Wisconsin delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules." 450 U.S. at 126, 101 S. Ct. at 1021.

Here, too, the state of Florida can run its presidential preference primary on January 29, 2008. No one seeks to stop the state from doing so. And plaintiff is perfectly free to vote in that primary, expressing his choice for the Democratic candidate for President. But Florida “cannot require that [Florida] delegates to the National Party Convention vote there in accordance with the primary results,” where the primary violates national party rules. *Democratic Party of U.S. v. Wisconsin*, 450 U.S. at 126, 101 S. Ct. at 1021. Thus Florida cannot require that the DNC seat any delegates selected in accordance with the results of the state-run primary that violates the DNC Rules.

B. None of the Tests for State Action Is Met

Three tests are used to determine whether a private entity, such as the DNC, is exercising “state action:”

(1) the public function test; (2) the state compulsion test; and (3) the nexus/joint action test. The public function test limits state action to instances where private actors are performing functions “traditionally the exclusive prerogative of the state.” The state compulsion test limits state action to instances where the government “has coerced or at least significantly encouraged the action alleged to violate the Constitution.” The nexus/joint action test applies where “the state has so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in the enterprise.”

Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F. 3d 1263, 1277 (11th Cir. 2003) quoting *Willis v. Univ. Health Serv., Inc.*, 993 F.2d 837, 840 (11th Cir.), cert. denied, 510 U.S. 976, 114 S. Ct. 768 (1993).

Here, Mr. DiMaio alleges that the DNC is refusing to allow the FDP to use the state-run, January 29, 2008 presidential preference primary to allocate, among presidential candidates, Florida's delegates to the 2008 Democratic National Convention, because that primary takes place before the earliest date allowed by the DNC's Delegates Selection Rules. Complaint, ¶¶ 6-9. The DNC is insisting that the FDP, instead, use a party-run alternative process, complying with the DNC's Rules, to allocate delegates to the Convention. *Id.* ¶¶ 9, 13. By virtue of sanctions automatically imposed under the Rules, and additional sanctions imposed by the DNC's Rules and Bylaws Committee under the Rules, unless the FDP uses such an alternative process, FDP will not be permitted to send any delegates to the 2008 Democratic National Convention. *Id.* ¶¶ 9, 13.

With respect to the three tests for state action, first, clearly the DNC is not exercising a "public function" in insisting that the FDP *not* use the state-run primary for the allocation of delegates. To the contrary, as Mr. DiMaio correctly alleges, the DNC is insisting, as it has the right to do under *Cousins* and *Democratic Party of the U.S. v. Wisconsin*, that the FDP *not* use the state's election machinery at all in the process for selecting delegates to the Convention, but rather, that the FDP use an alternative, state party-run process instead. Contrary to Mr. DiMaio's suggestion (Appellant's Brief at

8) the Florida presidential preference primary does *not* select the presidential nominee who appears on the state's general election ballot; rather, the entire Democratic National Convention does that. And the DNC sanctions involve the allocation of delegate positions that are not in any way created or assigned by the state. Indeed, those sanctions would disappear were the FDP to agree to implement a delegate allocation process—a caucus system—within the DNC's timing rule (on or after Feb. 5, 2008) which would *not* involve the state in any way whatsoever.

Second, the DNC is not exercising any state compulsory power here; again, the DNC is exercising only its own authority, under its Delegate Selection Rules, to determine that if a state Democratic Party is to send delegates to the Convention, it must select those delegates through a process that complies with the Party's Delegate Selection Rules.

And finally, the State of Florida is in no way involved or implicated in the DNC's enforcement of its Delegate Selection Rules. Rather, the DNC is requiring the FDP to *ignore* the results of the state-run presidential preference primary because it is being held in violation of the DNC's rules. In so doing, the DNC is taking the state of Florida out of the equation entirely: the DNC is insisting, again as it has the constitutionally-protected right to do, that the FDP run its own process, complying with DNC rules, for

the allocation of delegates to the Convention. For these reasons, the DNC clearly could not be “acting under color of state law” in enforcing its Delegate Selection Rules against the FDP.

C. Since the Supreme Court Has Recognized That the National Parties’ Right to Establish and Enforce Delegate Selection Rules Is Constitutionally Protected, No Court Has Held That Enforcement of those Rules Constitutes State Action

In the *Cousins* case, Court found it unnecessary to determine whether the DNC’s enforcement of its delegate selection rules constituted state action. *Id.* at 483 n.4, 95 S. Ct. at 545 n.4. Since *Cousins*, the courts have generally found it unnecessary to decide whether a national party’s enforcement of its delegate selection rules constitutes state action because, as explained in section III below, the courts have consistently held that even if it does, the national parties have the constitutionally protected right to enforce those rules and that right prevails over any countervailing state interest or the interest of any individual voter. *See, e.g., LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998); *Wymbs v. Republican State Exec. Comm. of Florida*, 719 F.2d 1072 (11th Cir. 1983), *cert. denied*, 465 U.S. 1003, 104 S. Ct. 1600 (1984). And certainly, *no* court, since the *Cousins* decision, has ever held that a national party’s enforcement of delegate selection rules constitutes state action.

Mr. DiMaio relies heavily on *Morse v. Republican Party of Virginia*, 517 U.S. 186, 116 S. Ct. 1186 (1996). Appellant's Brief at 7-8. That reliance is misplaced. In *Morse*, the Court held that a political party's imposition of a registration fee for participation in its state Convention did in effect constitute state action, for purposes of section 5 of the Voting Rights Act, because Virginia law directly conferred on the state party the power and authority to use that state Convention to select its nominee for U.S. Senate. 517 U.S. at 203, 116 S. Ct. at 1198. The Supreme Court took pains to distinguish that situation, however, from the enforcement of delegate selection rules, with respect to the issue of state action, distinguishing its earlier summary affirmation of a district court decision holding national party delegate selection rules did not have to be pre-cleared under the Voting Rights Act in *Williams v. Democratic Party of Georgia*, 409 U.S. 809, 93 S. Ct. 67 (1972):

Williams did not concern the selection of nominees for state elective office, but rather a political party's compliance with a rule promulgated by the Democratic National Party governing the selection of delegates to its national Convention....[T]he State exercised no control over, and played no part in, the State Party's selection of delegates to the Democratic National Convention.

Morse, 517 U.S. at 201-202, 116 S. Ct. at 1197.

Indeed, the only other court, since *Morse*, actually to have addressed the issue of whether enforcement of national party delegate selection rules

constitutes state action for purposes of Voting Rights Act section 5, found that it does not. In *LaRouche v. Fowler*, 77 F. Supp. 2d 80, 89 (D.D.C. 1999) (three judge court), *aff'd w/o opinion*, 529 U.S. 1035, 120 S. Ct. 1529 (2000), the court held that the Voting Rights Act “should not be read to extend coverage that would interfere with core associational rights; specifically here, internal national party rules as followed by state parties in a covered jurisdiction.”

Also misplaced is Mr. DiMaio’s reliance on *Bode v. Democratic National Party*, 452 F.2d 1302 (D.C. Cir. 1971) and *Georgia v. National Democratic Party*, 447 F.2d 1271 (D.C. Cir.), *cert denied*, 404 U.S. 858, 92 S. Ct. 109 (1971), for the proposition that the party’s enforcement of its delegate selection rules could constitute state action. Appellant’s Brief at 10. As Mr. DiMaio acknowledges (*id.* at 11-12), the D.C. Circuit itself subsequently questioned its own holding in those cases in *Ripon Society Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975)(en banc), *cert. denied*, 424 U.S. 933, 96 S. Ct. 1147 (1976). In that case, plaintiffs challenged the delegate allocation formula used by the national Republican Party on grounds that the formula violated the Equal Protection Clause. The D.C. Circuit noted that, since *Bode* and *Georgia* had been decided, the Supreme Court had decided several state action cases as well as the *Cousins*

case, and that, as the question of state action “now comes to us a third time...its answer is much less clear.” 525 F.2d at 574. The court declined to decide the state action question, holding that, *even if* the party was a state actor and the Equal Protection clause applied, it would not apply in the same way to the party as to the state itself because:

[A] party’s choice, as among various ways of governing itself, of the one which seems best calculate to strengthen the party and advance its interests, deserves the *protection* of the Constitution as much if not more than its condemnation. The express constitutional rights of speech and assembly are of slight value indeed if they do not carry with them a concomitant right of political association.

Id. at 585 (emphasis in original).

In light of the *Ripon* decision, the holdings of *Bode* and *Georgia* as to state action obviously have no continuing vitality. Indeed, as this Court observed in *Wymbs v. Republican State Executive Comm. of Fla.*, 719 F.2d 1072 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103, 104 S. Ct. 1600 (1984), in declining to follow *Bode* and *Georgia*: “Were the District of Columbia Circuit called upon to decide these cases today, the court might reach a different result.” *Id.* at 1081.

Equally unavailing is Mr. DiMaio’s effort to invoke two of the White Primary Cases—*Terry v. Adams*, 345 U.S. 461, 73 S. Ct. 809 (1953) and *Smith v. Allwright*, 321 U.S. 649, 63 S. Ct. 757 (1944). Appellant’s Brief at 8-9. All of those cases involved exclusion of African-Americans from a

party-run primary for statewide office, the winner of which was automatically put on the general election ballot, by the state. In *O'Brien v. Brown*, 409 U.S. 1, 92 S. Ct. 2718 (1972), the Supreme Court stayed lower court orders denying the Democratic National Convention the right to strip two states, Illinois and California, of all of their delegates because those delegates were selected in violation of national party rules. The Court held that, “[i]t has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated.” 409 U.S. at 4, 92 S. Ct. at 2720. And in so ruling, the Court specifically held the White Primary Cases to be *inapplicable*, explaining that, “[t]his is not a case in which claims are made that injury arises from invidious discrimination based on race in a primary contest within a single state.” *Id.* at 4 n.1, 92 S. Ct. at 2721.

The instant case, of course, is also not such a case, as Mr. DiMaio himself concedes. Appellant’s Brief at 12. On that same page of his brief, Mr. DiMaio raises the question of what analysis would apply if a national party were to impose invidious discrimination in the selection of delegates, rather than strictly forbid such discrimination, as the DNC Rules actually do.

(DNC Delegate Selection Rules 4, 5, 6, & 7). That is simply not a question presented in this case.

Thus, even if accepted as true and viewed in the light most favorable to him, Mr. DiMaio's allegations do not, and can not, allege the requisite state action to support his claim of a violation of his rights under the Fourteenth Amendment. As the district court correctly found, "in enforcing its delegate selection rules, [the DNC] is simply refusing to recognize the results of [the Florida primary] in the allocation of delegates to the Convention. This does not amount to state action." District Court Order at 9.

II. Even If the DNC Were a State Actor, Its Enforcement of Its Delegate Selection Rules Is Protected by the First Amendment

Even if the DNC were regarded as a state actor, its decision to force FDP to use a party-run system in order to allocate delegates to the 2008 Democratic National Convention would not violate the Equal Protection Clause. First, Mr. Dimaio simply misstates the issue when he suggests that the fundamental question in the case is whether the DNC's right to enforce its delegate selection rules, including the rules governing the timing of primaries and caucuses, "supersedes the right of an individual voter in one state to be treated equally to the voters in another state." Appellant's Brief

at 13. The DNC is *not* treating the Florida Democratic Party any differently than any other state Democratic Party; it is treating the FDP the *same* as all other state Democratic Parties, by insisting that FDP abide by the Delegate Selection Rules, rather than granting FDP an exemption from those rules. Every other state party, this presidential election cycle and in past cycles, in a state that holds a primary in violation of the Delegate Selection Rules, has been required to hold an alternative, party-run caucus process that complies with the Rules. Florida's Democratic voters are being treated, in that regard, in exactly the same way as voters in every other state.

Second, in determining whether a national party has violated the Equal Protection Clause, even assuming state action, the party is not actually treated like a state. That is because, unlike a state, the DNC has its *own* constitutional rights which must be weighed against those of the voter. In challenges brought under the Equal Protection Clause, the courts have consistently found that an individual voter has no more right than the state itself to compel the National Party to seat delegates chosen in violation of National Party rules, as long as the Party has rationally determined that those rules advance its political interests.

In *Wymbs v. Republican State Executive Committee of Florida*, *supra*, a Republican voter challenged the national Republican Party's delegate selection

rule (reflected in the state party's rules) providing for apportionment of delegates among congressional districts, on the ground that the rule violated one-person-one-vote and was therefore unconstitutional under the Equal Protection Clause. In addition to finding the case non-justiciable because it was "a disagreement over a pure question of internal Republican Party policy," this Court held that, even if the case were justiciable, "we would be constrained by the Party's countervailing *first amendment* rights of free speech and association." 719 F.2d at 1082, 1084 (emphasis in original). The Court went on to hold that "the strong first amendment associational freedoms possessed by political parties limited the district court's ability to tell the Republican Party how to conduct its internal affairs and whom it should represent." *Id.* at 1086.

Similarly, in *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987), a Democratic voter challenged the DNC delegate selection rule requiring that a state's delegation be composed of equal number of men and women, claiming that this rule violated the Equal Protection Clause and the voter's fundamental right to vote for delegates of his choice. The court rejected that claim, holding that, while the plaintiff voter certainly had a right to vote, the "question we must decide is whether the private associational rights of the party to give shape to its goals through the equal

participation of women at the national convention impermissibly limit [the plaintiff voter's]...participation in the primary process.” *Id.* at 842. The court ruled that:

The First Amendment associational rights of a political party have been deemed to outweigh various state interests in protecting the rights of that state’s voters....The case before us is limited to Bachur’s right to vote. Nonetheless, the efforts of the states to regulate delegate selection have been repeatedly rebuffed, and we may therefore derive instruction on the scope and sanctity of a political party’s associational rights.

When we balance the broad, encompassing First and Fourteenth Amendment protection enjoyed by the National Party and the State Party against the limited restriction on Bachur’s right to vote for delegates, we can only conclude that Rule 6C does not unconstitutionally infringe on Bachur’s right to vote.The Equal Division Rule manifestly has a rational purpose. *See Ripon Society*, 525 F.2d at 586-87 (“representational scheme and each of its elements [must only] rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals.”).

Id.

Again, in *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), the court ruled that the DNC could enforce a DNC delegate selection rule depriving a presidential candidate of any delegates based on a determination that he was not a *bona fide* Democrat, even though the candidate had won enough votes in the primaries to be allocated delegates. The court concluded that even if the DNC were to be treated as a state actor, the DNC would not be subject to the “compelling state interest” test because of “the presence of

First Amendment interests on both sides of the equation.” 152 F. 3d at 995.

The court held that the Constitution would be “satisfied if [the party’s rules] rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals.” *Id.* at 995, *quoting Ripon Society, supra*, 525 F.21d at 586-87.

Here, the DNC’s decision as to which states should be allowed to hold primaries or caucuses before other states, when the process should begin and how long it should last, obviously reflects the Party’s determination of the competing values of promoting retail politics in smaller states (such as Iowa and New Hampshire) while showcasing events in other states (such as Nevada and South Carolina) better reflecting the diversity of the Democratic electorate. The DNC’s determination of how many states should be allowed to hold primaries and caucuses before other states, and which states should be allowed to do so, is reflected in the Delegate Selection Rules which were carefully considered and adopted by a vote of the full Democratic National Committee. See R.E. Tab B, Ex. A, cover page.

Mr. DiMaio protests that, in his opinion, “[t]here is no rational basis for requiring and allowing the aforementioned states [Iowa, New Hampshire, Nevada, South Caroline] to conduct their presidential preference primaries and caucuses, before other states.” Appellant’s Brief at 15. But many other

Democrats obviously disagree, and that decision cannot, obviously, be left solely up to Mr. DiMaio or any other individual voter. It is the choice of the Party as a whole. “A *political party*’s choice among the various ways of determining the makeup of a State’s delegation to the party’s national convention is protected by the Constitution.” *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 124, 101 S Ct. 1010, 1020 (1981)(emphasis added). The DNC has determined that its rule governing the timing of primaries and caucuses, DNC Delegate Selection Rule 11(A), “rationally advances” the DNC’s “legitimate interest. . . in winning elections or otherwise achieving its political goals.” *Ripon*, 525 F.2d at 586-87.

For these reasons, even if the DNC’s enforcement of its Delegate Selection Rules was treated as state action, such action would not violate the Equal Protection Clause. Accordingly, for that reason also, the district court was correct in dismissing the complaint for failure to state a claim upon which relief can be granted.

III. **The District Court Correctly Found that Mr. DiMaio Lacks Standing**

The district court correctly decided that it lacked subject matter jurisdiction over Mr. DiMaio’s claims because Mr. DiMaio’s speculative and hypothetical allegations of possible constitutional injury do not confer

standing on him to bring this action. District Court Order at 6. That Mr. DiMaio seeks relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, “does not relieve him of the burden of satisfying the constitutional prerequisites for standing,” as a declaratory judgment may only be issued by a federal court “[i]n a case of actual controversy within its jurisdiction . . .” *Id.*, quoting *Emory v. Peeler*, 756 F.2d 1547, 1552 (11th Cir. 1985).

Standing is a doctrine that “stems directly from Article III’s ‘case or controversy’ requirement.” *National Parks Ass’n. v. Norton*, 324 F.3d 1229, 1242 (11th Cir. 2003) citing *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 756, 771, 120 S. Ct. 1858, 1862-62 (2000). To establish standing, a plaintiff must have 1) suffered an actual, imminent “injury in fact” which is concrete and particularized as opposed to conjectural or hypothetical; 2) there must be a causal connection between the injury and the conduct complained of; and 3) it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision from the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992) (internal citations and quotations omitted).

The district court correctly found that Mr. DiMaio “wholly fail[ed] to satisfy the “constitutional criteria for standing under Article III,” because his complaint “does not assert any actual or real controversy with the DNC or

the FDP.” District Court Order at 6. Mr. DiMaio’s allegations that by imposing sanctions on the FDP the DNC “may” violate his rights under Article II of the Constitution and the 14th Amendment or that the implementation of the DNC’s rules “may or may not” violate his right to vote in a presidential primary election constituted “nothing more than sheer speculation” by Mr. DiMaio that his constitutional rights could possibly be violated. *Id.*; Complaint ¶¶ 10, 12, 13. While it is true that “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice,” Mr. DiMaio does not even make any direct factual allegations that he has been or will be harmed by the conduct of the DNC and the FDP. *Lujan*, 504 U.S. at 564, 112 S. Ct. at 2138. Rather, his allegations that his rights “may” or “may not” be violated amount to nothing more than conjecture. Such speculative and hypothetical allegations of some possible injury clearly fall short of the actual, concrete and imminent injury in fact required to establish standing. *White’s Place, Inc. v. Glover*, 222 F.3d 1327, 1329 (11th Cir. 2000) (“speculative or imaginary injury will not confer standing”).

In essence, the district court concluded, Mr. DiMaio was “merely asking the Court for an advisory opinion with respect to the actions and obligations of the DNC and FDP.” Order Granting Defendants’ Motion to

Dismiss, Oct. 5, 2007 at 6. Of course, as the district court properly noted, “it is well-established . . . that [t]he federal courts ‘do not render advisory opinions. For adjudication of constitutional issues, concrete legal issues, presented in actual cases, not abstractions, are requisite. This is as true of declaratory judgment as any other field.’” *Id.* at 6-7, quoting *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89, 67 S. Ct. 556, 564 (1947); see also, *White’s Place*, 222 F.3d at 1329. Because Mr. DiMaio alleges only hypothetical injuries, the allegations, even if accepted as true, would fail to confer upon him standing sufficient to meet Article III’s “case or controversy” requirement.

Further, even if Mr. DiMaio could show some injury to his rights as a voter by reason of the DNC’s refusal to seat Florida’s delegates, it is unclear how that injury could be redressed by a decision of the Court. As this Court held in *Wymbs, supra*, the National Party has “the final say on what Florida delegates were seated at the” National Party Convention. 719 F.2d at 1085.

For these reasons, the district court was correct in concluding that it lacked subject matter jurisdiction over Mr. DiMaio’s claims.

CONCLUSION

For the reasons stated above, the district court correctly dismissed Mr. DiMaio’s complaint on the grounds that it lacked subject matter

jurisdiction over his claims and that he failed to state a claim upon which relief can be granted.

Respectfully submitted,

/s/ Charles F. Ketchey, Jr.

Charles F. Ketchey, Jr.
Florida Bar No: 0181735
AKERMAN SENTERFITT
401 East Jackson Street, Suite 1700
Tampa, Florida 33602-5803
Telephone: (813) 223-7333
Fax: (813) 223-2837

Of counsel:

Joseph E. Sandler
General Counsel, Democratic National Committee
SANDLER, REIFF & YOUNG, P.C.
50 E Street, S.E. # 300
Washington, D.C. 20003
Telephone (202) 479-1111
Fax: (202) 479-1115

Amanda S. LaForge
Chief Counsel
DEMOCRATIC NATIONAL COMMITTEE
430 S. Capitol Street, S.E.
Washington, D.C. 20003
Telephone: (202) 479-5153
Fax: (202) 572-7851

Attorneys for Defendant
DEMOCRATIC NATIONAL COMMITTEE

Dated: November 26, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th date of November, 2007 a true and correct copy of the Answer Brief of the Democratic National Committee was filed in the Eleventh Circuit Court of Appeals via EDF System; an original of the Answer Brief was forwarded to the Eleventh Circuit Court of Appeals for filing on Tuesday, November 27, 2007; and a true and accurate copy of the Answer Brief was served by U.S. Mail, First Class, upon counsel Michael A. Steinberg, 1000 N. Ashley Drive, Suite 520, Tampa, Florida 33602 and upon counsel Sean Shaw, Messer, Caparello & Self, P.A., P.O. Box 155790, Tallahassee, Florida 32317.

/s/ Charles F. Ketchey, Jr.

Charles F. Ketchey, Jr.
Akerman Senterfitt, P.A.

401 East Jackson Street
Tampa, Florida 33602

(813) 209-5060

(813) 223-2837 (Fax)

Counsel for Defendant

Florida Bar No. 181735

E-mail: charles.ketchey@akerman.com